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ABSTRACT

The legal implications of state-mandated minimum competency testing are assessed. Many state constitutions establish education as an individual's right. Court decisions have required school systems to provide educational services to every child who can benefit from them, implying equality of access to these services. When a minimum competency testing program has the effect of denying an educational benefit, then it can be argued that the testing program denies equality of educational opportunity, violating the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, or Section 504 of the Rehabilitation Act of 1973. Minimum competency testing statutes may violate standards of due process where an educational benefit has been denied and state action is judged to be arbitrary or lacking in fundamental fairness. However, courts have been reluctant to overturn state action where minimal elements of due process have been provided. Provision of clear educational objectives is necessary to establish the relationship between curriculum and the competency standard, but objectives may create a legal duty of care permitting a lawsuit based upon breach of duty to educate. Procedural safeguards for a testing program will vary according to state law, but a number of guidelines are suggested. (GK)

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Legal Issues in the Implementation Of Minimum Competency Testing

It is generally agreed that the competency testing movement has come about as the result of widespread public dissatisfaction with our nation's schools. Concerns about functional literacy, accountability, and equal educational opportunity have surfaced with regularity in debate over the public school system. Allegations of serious shortcomings in the quality of our educational programs have led to today's emphasis on measuring student competency levels as one indicator of the effectiveness of the educational program.

It is ironic that competency testing was originally and ostensibly designed to measure the performance of school districts and individual schools; yet much of the present legislation focuses on the student, not on the school. Since most statutes require a minimal competency level for graduation or promotion, it would now seem to be the student's responsibility to achieve the level of competence compelled by the testing program.

Placing the responsibility for learning on the student ignores the powerful influence of recent legal mandates affecting public education. Over the last 25 years our public schools have been subjected to increasing judicial and legislative intervention. Litigation, particularly in the 1960s and early 1970s, over issues of equal educational opportunity and due process of law has changed public policy for the nation's schools, sometimes dramatically but often subtly.

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Legal Implications of Minimum Competency Testing

by Joseph Beckham

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Introduction

In this fastback I shall assess the legal implications of state-mandated minimum competency testing as applied to public school students. Competency testing may refer solely to graduation requirements that a student must meet in order to receive a diploma. In another instance, particularly at the elementary level, competency testing may have as its purpose the identification of learning disabilities with emphasis on remediation and guidance. In yet another setting, competency testing may serve to evaluate the progress of a particular school in attaining educational goals established by the district.

Among the states, minimum competency testing programs have taken various forms. Early statutes focused first on measuring performance in basic skills; later statutes amended those initial provisions to establish requirements for graduation. Today, legislation has enlarged the scope and purpose of competency testing, often requiring school districts to adopt proficiency standards in basic skills; to assess student performance periodically from entry level through twelfth grade; and, after an identified time period has elapsed, to deny a diploma to any student who fails to meet the locally adopted proficiency standards. Included in recent statutory guidelines are procedures to insure timely notice and hearing for students and parents, proposals for citizen participation in the establishment of standards, and provisions for state department of education assistance in developing assessment mechanisms and testing protocol.

The enlarged scope and purpose of recent legislation on minimum competency testing suggest a desire to avoid the simplistic, knee-jerk reaction to public dissatisfaction with education by insuring reasonable, substantive, and procedural safeguards in the implementation of competency standards. Efforts to develop systematic processes to identify, counsel, and remediate students; to inform and counsel parents; to allow differential standards and assessment procedures for the learning disabled; and to provide educational options to students who are intially denied the diploma all reflect an awareness that ill-conceived or halfway measures may lead to litigation.

With some form of minimum competency testing for students authorized by statute or under legislative consideration in all 50 states, legal questions are imminent. Educators have expressed concern about the possible discriminatory impact of testing programs and the consequent effects on minority and handicapped students. The relationship between that which is taught in the classroom and the content of tests has been called into question. Many are questioning the appropriateness of the use of tests to determine placement or award of the diploma. Others are critical of the adequacy of phase-in programs establishing minimum competency testing.

Discriminatory impact raises issues of equal protection of the laws under the Fourteenth Amendment and other federal statutes that prohibit discrimination against minorities or other categories of disadvantaged students. Legal notions of fundamental fairness and good faith are relevant when testing programs are alleged to be arbitrary in design or in their implementation. Due process standards guaranteed by the Fourteenth Amendment may be invoked in cases where minimum competency testing is implemented without adequate notice, phase-in, or concern for remediation of learners. Already several legal challenges from students adversely affected by testing programs have been initiated. While still in the courts, these cases point up the potential for litigation arising from minimum competency testing legislation. Since statute law generally, and competency testing specifically, vary from state to state, this fastback will focus on a broad range of legal arguments that may be applicable in a given locale. Applying various theories of legal liability, I shall analyze the implications of minimum

competency testing statutes in order to suggest situations in which lawsuits might arise.

The first section summarizes recent cases, supplemented by hypothetical examples of legal liability, ranging from allegations of educational malpractice to breaches of federal constitutional and statutory provisions. By using both actual cases and hypothetical examples, the practicing educator will gain a clear understanding of the dimensions of legal liability associated with minimum competency testing programs. The second section of the fastback offers guidelines to school officials so they can establish reasonable policies with regard to minimum competency programs and avoid pitfalls that could result in legal liability.

Some words of caution are in order. States vary in their approach to minimum competency testing. In Florida and North Carolina school systems must use competency tests developed by the state department of education. Oregon statutes require local school systems to identify competencies and devise means for assessing those competencies. Combining the above approaches, Virginia and California require a test developed at the state level to be used in conjunction with locally identified and measured competencies. These differences in approach, plus the distinctions in state law governing the administration of educational programs generally, create special legal problems for specific states. Consequently, all the legal issues that can arise in a specific state jurisdiction cannot be delineated here. I advise the assistance of qualified legal counsel in the development of minimum competency testing for a specific jurisdiction.

This fastback is not the final word on legal matters related to minimum competency testing, nor can it define the parameters of legal liability so accurately as to be considered an unerring guide to school officials. New issues, beyond the legal problems described here, may emerge as states continue to modify minimum competency testing programs. In addition, court decisions mentioned here may cease to be accurate reflections of the applicable law. However, the legal issues related to minimum competency testing are beginning to surface and are now being tested in our courts. Some of the judicial messages are clear. Basic legal propositions supporting a child's right to an education con-

tinue to be affirmed, but the state's right to require some form of minimum competency testing is also being acknowledged and supported. Examination of the legal issues will permit understanding of the relationship between state accountability and the child's educational rights and will provide a basis for judgment by educators who seek to avoid litigation involving minimum competency testing.

The historic *Brown* v. *Board of Education* (1954) case outlawing segregated schools was the initial thrust in a series of court decisions that significantly revised our traditional notions about educational policy. In the two decades following *Brown*, the nation's courts, particularly the U.S. Supreme Court, expanded the concepts of equal protection of the law and due process of law under the Fourteenth Amendment. Many of these suits were brought by parents of school children, based on claims that their children were being denied equal access to educational opportunities or due process of law. In this era of legal confrontation, legislation designed to implement these constitutional guarantees, particularly the Civil Rights Act of 1964, extended beyond race to declare discimination against national origin minorities, the handicapped, and women to be illegal. As courts came increasingly to be seen as the tool for the resolution of social conflicts, school districts and state departments of education found that they could be sued for violating vague notions of fairness and reasonableness. In the next section, these and other established bases for legal liability, as they relate to minimum competency testing programs, will be discussed.

Equal Educational Opportunity

An examination of the cases dealing with equal educational opportunity suggests three phases of litigation. Initially, federal and state constitutions were interpreted to grant the right of all children to admission to public school. The *Brown* decision guarantees this right where access has been denied on racial grounds. Other cases, such as *PARC* v. *Commonwealth of Pennsylvania* (1972), have extended right of access to public education to the handicapped, the retarded, and other groups. In the second phase, state constitutional provisions providing "thorough and efficient" education were interpreted to guarantee some minimal level of financial equity in educational opportunities provided by public school systems. Included among these cases are state court decisions mandating reform of the state system of financing public schools, as in *Serrano* v. *Priest* (Calif. 1976) and *Robinson* v. *Cahill* (N.J. 1976). In the third phase, courts became concerned with challenges to educational programs and placement practices that allegedly denied educational opportunities appropriate to the students' individual needs, as in *Hobsen* v. *Hansen* (1967) and *Lau* v. *Nichols* (1973). Cases of this third type can be expected to continue, further refining the nature of the individual's right to education under state constitutional provisions and under the notion of the equal protection clause of the Fourteenth Amendment.

The impact of these court decisions compelling major changes in public schools, ranging from desegregation to special education, have been mandated with such rapidity that the public school system has

reeled under the demand. What is clear, however, is that our courts have placed the responsibility for insuring educational opportunity, indeed "meaningful" educational opportunity, squarely on the nation's public school system.

When taken together, state and federal court decisions have established extensive guidelines to insure minimal educational programs. The judicial mandate requires school systems to provide educational services to every child who can benefit from them. Exactly what is meant by this requirement is still subject to debate, but the "language" that reoccurs in the judicial opinions seems to specify that the state provide equality of access to appropriate educational services in order to insure a minimal level of quality for the individual child. There are several propositions that follow from this judicial standard:

1. The provision of appropriate educational services is a state, not a federal, responsibility.

2. Recognition of "a right to an education" means the state must insure a meaningful opportunity for education.

3. Meaningful opportunity for education requires a school system to provide programs and facilities appropriate to the child's individual needs.

4. Program differentiation according to individualized needs must meet minimum standards of quality.

By collective judicial definition, educational opportunity requires the state to provide access to schooling that meets the needs of the individual and to guarantee a minimal level of quality in the provision of educational services. *Access* in the above context clearly suggests the state's responsibility to make available a broad range of educational programs. *Quality* presupposes evaluation and assessment of the educational programs.

In the wake of litigation, state and federal legislation, administrative regulations, and policy pronouncements have sought to carry out the judicial mandates regarding educational opportunity. Several states have acted to revise school funding guidelines to insure equal educational opportunity. Many state legislatures have passed statutes requiring their state boards of education to establish standards of quality to insure appropriate educational programs. Federal initiatives

such as the Education for All Handicapped Children Act (PL 94-142), the Rehabilitation Act of 1973, and the Civil Rights Act further similar concerns for equal educational opportunity.

This intense legislative activity may, in part, account for the development of minimum competency standards. Also, because of public concern for the quality of educational programs, minimum competency testing became a political issue at a time when judicial and legislative concern for the accessibility and quality of educational programs was of major national importance. Undoubtedly, minimum competency testing became a popular issue because it appeared to remedy public concerns about the integrity of the educational program. As a requirement for graduation, minimum competency testing would restore the meaning of the diploma. It would reinstate an emphasis on cognitive development and reinforce the popular demand for a return to basics. Finally, it would motivate teachers and students to work purposefully toward defined educational goals. These and other arguments became part of the rhetoric of state legislative initiatives on behalf of minimum competency testing.

In its simplest form, however, minimum competency testing creates a direct conflict with the judicial and legislative mandates guaranteeing equal educational opportunity. When the testing requirement has the effect of denying the certificate of graduation or promotion, when the primary impact of the standardized test can be interpreted to deny an educational benefit, then it can be argued that minimum competency testing denies equality of educational opportunity. Where that denial appears arbitrary or capricious, where it suggests unreasonable discriminatory impact, where it interferes with a legally recognized right to educational benefits, the likelihood of litigation will increase.

Discrimination Under the Fourteenth Amendment

Under the Florida minimum competency program students must pass a functional literacy test within four tries in order to receive a high school diploma. In addition, Florida law mandates a compensatory education program that requires remedial instruction for students who need assistance on the basis of test performance. In October 1978, Florida's new functional literacy test was administered to high school

juniors. Test data confirmed predictions of a higher rate of failure for black students than for white students, with only 23% of black juniors passing the mathematics component and 74% passing the communications section. Comparable figures for white students showed a passing rate of 76% and 97%, respectively.

The initial results of the Florida minimum competency test suggest a disproportionate racial impact that could present grounds for suits based on constitutional provisions or federal statutes prohibiting racial discrimination. The effects of competency testing programs that have overtones of racially discriminatory practice might include the denial of educational benefits such as the diploma or certificate of graduation to a disproportionate number of minority students or the remedial grouping or tracking of students within schools such that segregated systems are created.

A class action suit filed by a black North Carolina youth illustrates the line of argument that might be used to attack minimum competency tests required for a high school diploma. In *Green* v. *Hunt* (1979) black students argued that the North Carolina minimum competency test discriminates against the disadvantaged by excluding minorities from the educational process and subsequently from the job market. Based on the results of the pilot-testing program, a disproportionate racial impact in the test was evidenced; the student plaintiffs alleged that it carried forward the past pattern and practice of segregation prohibited by the Fourteenth Amendment. The minimum competency test was compared to the literacy tests once used in North Carolina to deny the right to vote. Citing *Gaston County, N.C.* v. *United States* (1969) the students' attorney noted that a North Carolina literacy test had the effect of denying the right to vote to racial minorities because the state had deprived black citizens of educational opportunities through the maintenance of separate and inferior public schools. Similarly, the projected effect of the North Carolina minimum competency test would be to carry forward the effects of a separate and inferior public school system, thus serving to perpetuate the inequities of a constitutionally prohibited segregated system.

As the *Green* case suggests, most challenges to mandatory testing focus on allegations that the test discriminates against a minority. In

cases asserting a denial of equal educational opportunity, courts have been particularly concerned with any charge of ethnic or racial discrimination. Under the equal protection clause of the Fourteenth Amendment, a fundamental right cannot be denied by a state without a showing of compelling state interest.

In situations concerning ordinary rights, such as the right to drive a car, the state need only demonstrate a rational basis for its action, such as a minimum age requirement for an unrestricted driver's license. The would-be challenger of the state law assumes the burden of proving that the state's action does not have a rational basis. In cases involving a fundamental right, however, the burden of proof shifts to the state, which now must convincingly show that a compelling state interest exists to justify infringing upon and restricting full enjoyment of the designated fundamental right. The court exercises the "strict scrutiny test" rather than the "rational basis test" to safeguard any undue infringement of an individually guaranteed right.

Where a student alleges the denial of a fundamental right to equal protection of the laws and presents convincing evidence that official action is grounded upon racially or ethnically based discriminatory practice, courts will adopt the "strict scrutiny test" and require the state to show a compelling interest for the discriminatory practice under review. The basis for requiring strict scrutiny of state action in cases of this sort is that race or ethnic origin has been judicially determined to be a "suspect classification" when used as a rationale for discriminatory practices. Thus, if significantly large numbers of racially or ethnically identifiable students fail to achieve satisfactorily on the minimum competency examination in comparison with other student groups, then the testing program is likely to be subject to legal challenge on the ground of discrimination in violation of equal protection of the laws. Where a school district or the state has been found to have engaged in a past pattern and practice of official segregation, the strict scrutiny test is more likely to be adopted. Consequently, the state would have to establish a "compelling interest" for continuing the testing program. Such a heavy burden of proof would be required to establish that a state has such a compelling interest in the conduct of its

minimum competency testing program that it is unlikely the test would meet equal protection standards.

In states that have maintained previously segregated systems, or where a court finds that the state or the school district has engaged in past intentional racial or ethnic discrimination, special care must be taken to avoid a legal challenge to minimum competency testing. The Fifth Circuit Court of Appeals has, in a series of related cases, established that ability grouping based on testing is prohibited where there is a disproportionate racial impact that tends to perpetuate past patterns of racial segregation. These cases challenged whether black students educated in formerly segregated schools could be grouped or tracked in programs based on IQ and reading readiness tests. The appeals court did not decide on the validity of the tests, but did hold that it would be impermissible to assign students in recently desegregated schools on the basis of the tests. Clearly, remedial programs mandated by minimum competency statutes may be subject to similar constitutional scrutiny, where the impact of a placement or remedial program can logically be argued to continue the prior effects of former segregated practices.

This "prior effects" doctrine has implications for school districts with a previous history of de jure segregated practice. It can be forcefully argued that no *intent* to discriminate need be established where the consequences of a minimum competency test have a disproportionate racial impact on students who received all or a part of their public school education in racially segregated schools. However, where prior racially segregated practice took place in the remote past, or never existed, it is unlikely that disproportionate racial impact of a minimum competency test would establish sufficient intention to discriminate in violation of constitutional law. In such a case, a student or parent would carry the burden of establishing the school district's discriminatory purpose in its implementation of minimum competency statutes. The leading case of this type is *Washington* v. *Davis* (1976) in which the U.S. Supreme Court held the disproportionate racial impact of a police department's personnel test to be insufficient to establish unconstitutional racial discrimination.

The line between discriminatory *intent* and discriminatory *impact*, however, is not so distinct as to preclude the possibility that a court could find discriminatory intent in the consequences of a minimum testing program. Where a minimum competency test disqualifies substantially disproportionate numbers of black or other minority students, or creates racially or ethnically identifiable groupings for tracking or remedial purposes, it may be possible to argue that evidence of the school district's intent to segregate is manifest in the consequences of the testing program. The success of such an argument seems remote at this point, but it cannot be dismissed entirely. As a consequence, school districts with no history of past discriminatory practice must still be wary of any disproportionate racial or ethnic impact in the consequences of minimum competency testing.

Discrimination Under Title VI of the Civil Rights Act

Application of the regulations and standards adopted under Title VI of the Civil Rights Act of 1964 would appear to offer an alternative cause of action for any person or class of persons alleging the discriminatory effect of a state's minimum competency testing program. Title VI prohibits any practice that would have the effect of restricting an individual, on the grounds of race, color, or national origin, "in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit." By incorporating an effect rather than a purpose standard, the Title VI regulations would place the burden of validating a competency test on the school district once the parent or student demonstrates that a disproportionate number of minority students had been disqualified or inappropriately grouped for remediation under the testing program.

Testing programs that have a disproportionate effect on minorities protected under Title VI have been subject to close judicial scrutiny in the past. In *Hobson* v. *Hansen* (1967) a federal district court found unconstitutional a program in which assignments were made primarily on the basis of standardized aptitude tests. The court noted that the constitutional inquiry was precipitated by the fact that those consigned to the lower track were poor and black, whereas those in the upper tracks were more affluent and white. Having established the disproportionate effects of the testing program on the minority, the court

placed the burden of explaining why the poor and the black should be those assigned to the lower track on the school district.

The *Hobson* court found standardized aptitude tests inappropriate because the tests were standardized on and relevant to white middle-class students; thus black students were classified on the basis of their socioeconomic status rather than on their ability to learn. In taking judicial notice of other factors that contributed to the test inadequacies, the court hypothesized that teachers would treat low-scoring students in ways that would engender the student's conformity to behavior expected of low achievers and foster alienation in the disadvantaged student who would be made to feel incapable of competing in a school system dominated by white middle-class values. The inadequacies of the aptitude tests and the tracking program were further underscored by the failure of the district to provide adequate remediation and compensatory education.

Tracking, or some other form of ability grouping, has been permitted by federal courts, so the decision in *Hobson* has had limited impact. It is likely, however, that the rationale in *Hobson* will be used to challenge competency testing programs in which a disproportionate number of minority students are assigned to remedial or compensatory programs. Where large numbers of black, Hispanic, or other minorities fail the mandated tests or comprise the majority in the remedial program, a violation of the law on racial discrimination in federally assisted programs under Title VI could be charged. Whether the charge would be sustained in light of the previously mentioned case of *Washington* v. *Davis* remains to be seen.

Regulations adopted under Title VI have been judicially affirmed in *Lau* v. *Nichols* (1974). In *Lau* the U.S. Supreme Court relied solely on Title VI in holding that non-English-speaking minority students (Chinese) were denied a meaningful opportunity to participate in the educational program because the public schools failed to provide sufficient supplemental courses in English for the national origin minority. Inherent in the Court's opinion was the necessity of providing an educational program with sufficient compensatory and remedial assistance to make the educational experience meaningful and effective to the individual. Judicial confirmation of the Title VI regulations

suggests that any minimum competency program that has a disproportionate impact on a minority protected by Title VI would be subject to the same judicial standards.

Lau also illustrates the problem of a testing program that fails to meet the needs of non-English-speaking and national origin minority students. Where such a student is either excluded from school or placed in a class for special educational services as the result of a minimum competency test, a legal challenge under Title VI may result. A case illustrating this legal challenge, *Diana* v. *California State Board of Education* (1970), involved Mexican-American children placed in an educable mentally retarded (EMR) class based on IQ testing in English by a school psychologist. Evidence of significantly better performance on nonverbal portions of the tests and of higher test scores when retested by a bilingual psychologist who permitted answers in Spanish was presented to the court. The result was an in-court stipulation agreement that future tests would use both English and the child's native language in order to assess IQ for placement purposes. Similar assignments of non-English-speaking children based on minimum competency tests utilizing the English language alone may violate Title VI.

On the other hand, demonstrating competency in the English language on a minimum competency examination may be an explicit educational objective of a school district's testing program. Most tests do appear to emphasize reading and writing in order to meet requirements for the diploma or for placement and promotion within the district; thus special attention must be given in order to resolve conflicts between Title VI guidelines and minimum competency standards. Some of the recommendations in the *Diana* case may prove helpful. Where placement is a key objective, utilization of the child's primary language and English would seem appropriate in testing for competency in other subject areas and for competencies other than English language ability. In addition, scores would appear to require substantiation through other forms of evaluation in addition to the minimum competency test.

Discrimination Under the Rehabilitation Act

In a January 1979 information survey conducted by the National Association of State Directors of Special Education and the North

Carolina Department of Education, it was found that no uniform procedures exist nationwide in awarding diplomas to handicapped students. Among the variations found in state programs for the handicapped were: 31 states award regular diplomas to handicapped students; 17 allow local board discretion in the award; nine states award a special certificate of attendance; and 17 states allow local board discretion on whether to permit a special certificate award.

The potential for unfair discrimination in the application of minimum competency testing programs would appear to extend to handicapped students if the language of Section 504 of the Rehabilitation Act of 1973 is held to be comparable to that of Title VI. Section 504 requires that:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

With regard to the handicapped, however, a special problem of interpretation and application of statute law exists. Handicapped children must be integrated into the public school's regular education program to the maximum extent appropriate, but special treatment of the handicapped may be necessary in a number of contexts in order to insure equal opportunity. Minimum competency testing adds to this problem by raising questions as to the level of participation or exemption of handicapped students relative to testing and as to appropriate standards to be applied in assessing competency and awarding diplomas. Any policy excluding a handicapped student from participation in the minimum competency testing program would appear to violate the requirement of integrating the student into the regular educational program to the maximum extent possible. Alternatively, failure to provide differential standards and alternative modes of testing to the handicapped person who needs special treatment may violate the individual's right to benefit from educational programs meaningful and effective for the handicapped individual.

One answer to this problem is the incorporation of an individualized minimum competency testing protocol within the Individualized Education Program (IEP) required for each handicapped child

under the Education for All Handicapped Children Act of 1975. Individual decisions about minimum competency testing programs applied to the specific capabilities of the handicapped child could then be made relative to exemption from the program, application of a differential standard for award of the diploma, and the use of differential assessment procedures in consideration of the extent and severity of the student's handicap. The act mandates that an individualized education program be written for each handicapped child. Included in the IEP are elements related to the child's level of performance, instructional objectives, and educational goals. For purposes of minimum competency testing, a description of the extent to which the child can participate in the testing program and a statement of services needed to permit participation would be part of the justification compelled by the IEP.

Due Process of Law

The provisions of minimum competency testing statutes may be held to violate standards of due process under the Fourteenth Amendment where a property right in an educational benefit may be denied or a stigma may cause irreparable harm to future educational or occupational interests. In the absence of appropriate due process, state action has been struck down where it can be demonstrated to be arbitrary and capricious or lacking in fundamental fairness. However, appropriate standards for application of this doctrine in academic settings are not well defined, and courts have been reluctant to overturn state action where minimal elements of due process, particularly adequate notice, have been provided.

Denial of a Property Right in an Education Benefit

Minimum competency testing may present conflict with state laws guaranteeing the right to a public school education. The U.S. Constitution makes no mention of education as a federal obligation, hence states have responsibility for the provision of public education. Compulsory attendance laws, state constitutional mandates to provide free public education, and other state enactments have long been judicially interpreted to place the burden of educating the young upon the state.

There is no question that a student has a property right to the educational benefits guaranteed by state law. In *Goss* v. *Lopez* (1975) the U.S. Supreme Court concluded that expulsion or suspension from the school's educational program could infringe on the student's right to

educational benefits, compelling the school district to provide due process of law in disciplinary actions. The Court reasoned that the Fourteenth Amendment required the state to give the student due process of law where the denial of a property right might result from state action.

Minimal elements of due process in an educational setting have been defined to include the right to adequate notice prior to any school district action that would deny an educational benefit. This requirement appears to apply regardless of whether the action is considered to be disciplinary, as in *Goss*, or academic, as in *Horowitz* v. *Board of Curators of the University of Missouri* (1978). In the *Horowitz* case the Supreme Court was reluctant to interfere with the judgments of academic evaluators considering a medical student's clinical performance. However, the Court did conclude that repeated warnings of unsatisfactory evaluations, coupled with opportunities to improve performance over the course of the student's medical training, had been sufficient notice to meet constitutional due process guidelines.

Where minimum competency tests may be used to determine placement in remedial or special education classes or where the testing program can be responsible for denial of the diploma or certificate of graduation, a denial of educational benefits guaranteed by state law may occur. Consequently, courts are likely to give careful attention to the school district's rationale for minimum competency testing and to assess the extent to which a denial of a student's property right to a free public education may result.

A Florida federal court has ruled that imposing minimum competency testing too hastily can result in court orders compelling the award of the diploma. Black students who failed Florida's 1978 minimum competency test alleged that they were denied equal protection and due process of law under the Fourteenth Amendment by imposition of the Florida minimum competency requirements. In *Debra P.* v. *Turlington* (1979), the federal district court agreed with the students and ordered that the diploma be awarded to students who failed the examination but had otherwise qualified for graduation. Emphasizing the due process issue, the court found that students were not put on notice that graduation would depend on mastery of skills at the time of instruction in those skills. As a practical matter, six years must pass

before Florida's minimum competency test legislation, enacted in 1977, can be used to deny the diploma.

The court in *Debra P.* linked the issue of inadequate notice to the disproportionate racial impact of the test. Many of the black students who failed the test had received their early education in segregated schools. The court concluded that a past pattern of racial segregation resulted in an inferior education that still affected the black students' performance. Under these circumstances, an elongated phase-in period for competency testing, with periodic notice to students as to what they would be required to know, was required by the court.

Where students are informed late in their educational program that passing a minimum competency test is a requirement for award of the diploma or certificate of graduation, a student or class of students might contend that notice of the requirement was inadequate. It could be argued that the graduation requirement would violate legal notions of due process in that the significance of the diploma requirement might have influenced teaching and learning during the students' previous schooling had the notice been timely. If the results of minimum competency tests fall within the realm of "academic evaluations" characterized by the *Horowitz* majority, then it can be argued that courts will be unlikely to grant relief, provided students are allowed repeated opportunities to take the minimum competency test and are given notice of the test requirements in time to prepare themselves.

Denial of a Liberty Interest

Another potential legal attack on minimum competency testing is implicit in any scheme that connects the testing program with placement in special or remedial education classes or denies the award of the diploma. Constitutional guarantees of due process insure a right to a liberty as well as a property interest in an educational benefit. In an educational setting, this liberty interest may be infringed where a stigma attaches to the student as a result of performance on the minimum competency test.

The stigma of placement in a low group or failure to graduate is generally recognized. If the placement or denial of the diploma is based on inaccurate measures of ability or improper interpretation of measures used in a minimum competency testing program, the testing pro-

gram may be subject to legal challenge on the ground that it denies the student's right to liberty without affording the student due process of law.

Suits alleging a denial of a liberty interest based on the stigma that attaches from the results of a testing program have been decided on other grounds in recent court decisions. As a consequence, it is difficult to assess the likelihood that courts would, at some later date, permit a cause of action solely on this ground. However, the legal remedy for such a stigmatization has been specified in numerous decisions interpreting liberty interests protected by the Fourteenth Amendment. In most cases, the court has imposed a requirement that a complete administrative hearing be granted to the party guaranteeing proper notice and an opportunity to present evidence contrary to that which resulted in the stigma. The clear message to be drawn from these related cases is that those who construct and administer the competency test must use great care in evaluating competency and in acting on those evaluations. As with issues of due process grounded on denial of a property right to education, it is critical that the student be given notice of the minimum competency test well in advance, together with an opportunity to retake the test prior to a final decision on placement or denial of the diploma or certificate of graduation.

Fundamental Fairness and Reasonableness

Clearly, where a denial of substantive due process is alleged relative to minimum competency testing requirements, courts will be asked to resolve questions of adequate remediation and notice for a test that purports to measure years of cumulative learning. It is difficult to determine how courts will resolve questions of this type, but they will be guided by language implementing minimum competency testing and by notions of what is reasonable notice and fairness to the student. In *James* v. *Board of Education* (1977) a class action suit was brought by parents and teachers to enjoin the administration of comprehensive examinations, based on contentions that the integrity of the examinations had been so compromised that use of the results for purposes of promotion, admission to special programs, and allocation of funds and teachers within the school system would violate fundamental fairness. In holding that the board could not be enjoined from administering the examinations, the Court of Appeals of New York noted that "courts may not under the guise of enforcing a vague educational public policy . . . assume the exercise of educational policy vested by constitution and statute in school administrative agencies." The court chose not to decide whether the examination had been so compromised as to lack validity as an instrument for measuring educational achievement, because statute law delegated that question to the "judgment and discretion of those responsible for the administration of public schools."

In a similar case parents challenged the authority and propriety of the Florida Department of Education in establishing basic skill and

literacy requirements under Florida's minimum competency testing program. The parents charged that the legislature had improperly delegated power to set standards to the commissioner of education and, in addition, the commissioner had improperly exercised discretion in setting minimum cut-off standards and scoring criteria for the statewide testing program. A hearing examiner ruled that the legislature could properly delegate authority to the commissioner of education to set standards and determine scoring criteria for the minimum competency examination. In *Florida State Board of Education* v. *Brady* (1979) a state appeals court upheld scoring criteria adopted by the commissioner of education as valid exercises of administrative authority. Furthermore, the appeals court ruled that proficiency in any subject was uniquely and peculiarly a matter for the field of education to decide, not a matter to be resolved by legislative or judicial authority.

Both the *James* and *Brady* cases suggest that courts will be reluctant to interfere in matters of educational policy where legislative action or school board policy is based upon carefully reasoned judgments about appropriate testing requirements. Decisions related to the make-up and selection of test items, cut-off levels establishing minimum acceptable competence, and opportunities for review and retesting are within the competence and discretion of professional educators, provided the consensus of expert judgments is based on sound educational thinking. Courts recognize that expert judgments are never totally infallible, but courts do insist that the rationale for the decision avoid capricious or arbitrary action.

Nowhere is the risk of arbitrariness potentially greater than in the area of congruence between that which is taught and the content of a minimum competency test. Educators are often divided on specifically what a minimum competency examination should test, and if such a division goes unresolved in construction and administration of the examination, the result could be a court challenge. Educators must insure that what is tested on the minimum competency test match with what is taught in the classroom. This requires, at a minimum, that the school's curriculum objectives be delineated clearly and that the objectives match accurately with test items. In addition, the school system must periodically assess what is actually being taught to insure con-

formance with curriculum objectives and test content. Documentation of periodic classroom assessment, test modification, and curriculum revision are essential in order to establish evidence of coordination between actual instruction and testing.

Educational Malpractice

Provision for clearly stated educational objectives, whether contained in a school district's curriculum objectives or in a state department of education policy statement, represents a critical element in any viable minimum competency testing program. As pointed out earlier, educational objectives are necessary in order to establish the relationship between that which is taught and the competency standard. Failure to provide clearly specified objectives may leave the school system open to charges of a denial of due process or arbitrary and capricious action.

On the other hand, clearly specified objectives may create a legal duty of care that could permit a lawsuit based upon the breach of a duty to educate. Educational objectives could be interpreted to define clearly the school district's intent in the education of children. Ironically, failure to achieve competency, as assessed by minimum competency tests, could be convincing evidence of a breach of a duty to educate.

The legal reasoning behind recognition of a duty to educate might run this way:

1. To establish minimum competencies is to assume that there are basic, fundamental capabilities a student must demonstrate in order to function in a complex, technological society.

2. To evaluate the acquisition of these competencies and develop remedial programs where competencies are deficient and to deny the diploma where a student fails to meet the competency standard is to imply that schools can foster the specified competency level.

3. The specification of minimum competencies and standards for their acquisition, whether dictated at the state or local level, establishes

a state or school district responsibility for the educational attainment of public school pupils.

4. Once judicially recognized, this responsibility will be interpreted as a legal duty of care running from educators to students, which, when breached, will serve as a basis for the school district's legal liability.

There would appear to be little question that failure to meet the minimum competency on a standardized test could be used as a part of the cumulative burden of evidence necessary to establish breach of a duty to educate. The principal question, however, appears to be whether courts will recognize that statutory mandates for minimum competency testing, taken with school district competencies and assessment standards, constitute an implied duty of care which, if breached, would sustain an action in damages against a school district. Up to this time, the likelihood of a successful suit for breach of a duty to educate has been slight. However, the potential injury in denial of the diploma, coupled with increased public concern for accountability in the schools, makes such a challenge to minimum competency testing a legal issue ripe for decision.

In the now famous case of *Peter W.* v. *San Francisco Unified School District* (1976) a former student charged the school district with negligence in failing to provide adequate instruction, thereby breaching mandatory duties established by the statute and common law of California. The former student, an 18-year-old male recently graduated from a district high school, also charged that the district either intentionally or negligently misrepresented his performance in basic skills. The trial court dismissed the charges and the California Court of Appeals agreed, stating that a cause of action in tort could not be established by a person who claimed to have been inadequately educated.

In *Peter W.* the appeals court concluded that judicial recognition of a breach of a duty to educate could only be established by public policy considerations. Among the factors that could influence the court to establish such a duty to educate are the relative ability of the parties to meet the financial burden of damages resulting from a former student's injuries and the role imposed by statutes and school district policy

upon the defendant school district. After assessing these factors, the court could find no state statute law or policy of the district that could conceivably be inferred to establish a duty to educate. In other words, the justices could find no objective legal standards that clearly established the school district's duty in educating students. The court then noted that permitting an action for educational malpractice could be an unreasonable economic burden on public schools. In the opinion of the court, schools were already beset by social and financial problems so substantial that allowing the former student's claim for educational malpractice would expose schools to legal claims in numbers so large as to destroy the school's ability to provide educational services.

The same issue of whether courts will recognize a cause of action for educational malpractice, based upon recognition of a legal duty to educate, was presented in *Donohue* v. *Copiague School District* (1978). In this case a high school graduate who had received failing grades in several subjects and lacked basic reading and writing skills sought recovery based on New York constitutional and statutory provisions mandating a system of public schools for the education of children. Donohue, the high school graduate, noted that state statutes required evaluation of "underachievers" for the purpose of determining whether or not a student could benefit from special education programs. Having established that as a student he was failing numerous courses, the graduate offered evidence that school authorities were aware of his poor performance. The graduate then argued that these statutes implied a duty on the part of the school district to do more than promote him from year to year without giving attention to his special education needs.

The *Donohue* court concluded that the statute was designed merely to direct greater educational resources toward satisfying the needs of underachievers. It did not create a duty on the part of the district to provide special education for the student, nor was the statute intended to permit a graduate to sue for damages when no special education benefits were provided. The court went on to say that while plaintiff might be entitled to demand special testing and evaluation directed by the statute, the education statute could not serve as a basis for a cause of action in tort for breach of a duty to educate.

Instead of a unanimous court decision, as in *Peter W.*, the *Donohue* court was divided by a separate opinion that may foreshadow future decisions on educational malpractice. The dissenting opinion contended that Donohue had stated a case for educational malpractice by arguing that the school district had a duty to educate and qualify students for the high school diploma. The *Donohue* dissent emphasized that denial of the graduate's complaint, where the school district was in direct contravention of a statutory mandate, would only serve to sanction misfeasance in the educational system. The dissent quoted the language of the statutory provisions designed to implement testing and remediation for underachievers in the school system and concluded that the former student had shown the existence of a statutory duty flowing from the school district to him. The cause of plaintiff's failure to achieve a basic level of literacy was, in the dissent's view, a question of proof to be resolved at trial.

The line of reasoning in the *Donohue* dissent suggests that statutory or public policies of a school district may give rise to a case of educational malpractice where the mandated responsibilities have not been met by the school district. As statutes and school district policies further define minimum competencies, establish testing and remedial programs to augment the competencies, and specify requirements for the award of diplomas, the likelihood of a judicial determination that a school district is under a legal duty to educate a plaintiff and qualify him or her for a high school graduation certificate increases. Where a student complains of a violation of the state's education law, it remains for the court to determine if educational malpractice has occurred. Up until 1978, the public policy arguments appeared to be balanced in favor of school districts. However, in 1978, a case presenting a sufficiently gross breach of a statutory duty to educate resulted in a judicial tipping of the scales toward school district liability.

The case of gross violation was *Hoffman* v. *Board of Education* (1978). In *Hoffman*, the New York Appellate Court affirmed a damage award against the board of education after jury determination that the board had negligently breached a legal duty in allowing a child to continue in special education classes for retarded children even though the

child was not retarded. A school psychologist had initially made the placement on the basis of kindergarten assessment, but had recommended reevaluation of the child's intelligence within two years due to the likelihood that a severe speech defect might have influenced assessment. The board was held to have breached a statutory duty of care in its failure to reevaluate the child within an 11-year period. For 11 years, until the child reached the age of 17, the child remained classified as mentally retarded. Damages of $500,000 for psychological and emotional injury to the child were recoverable.

The court in *Hoffman* did not provide a general endorsement of educational malpractice actions. Affirming the jury's determination that the school district had been negligent does not mean that parents may obtain redress in each instance in which their child cannot perform satisfactorily on a standardized test. The case was unique in that the court emphasized that numerous "affirmative acts of negligence" were present. Countless teachers, counselors, and administrators had, over the 11 years of the child's education, reviewed the student file that contained the psychologist's recommendation for reevaluation, but over and over again the recommendation had been ignored. The court considered each failure to bring the reevaluation to the attention of the schools to be an egregious error, repeated on a wholesale basis by numerous professionals in the school system. To deny the jury findings in a case of such extreme negligence would, in the court's opinion, go too far in protecting the school system from litigation involving allegations of educational malpractice.

Hoffman appears to establish that a school district can be held liable for negligence where the negligence of the district is extreme and the duty to educate is sufficiently clear. It may go too far to say that minimum competency testing will establish a legal duty on the part of a school district to educate and qualify every student for a diploma. However, a minimum competency program will create statutory and school district policy standards that could be the basis for an educational malpractice suit. What is clear is that the minimum competency program must incorporate sufficient safeguards to insure that each student actually receives opportunities for retesting, remediation, and special placement prior to any denial of the diploma.

The various statutory provisions implementing minimum competency testing programs prescribe duties requiring that student performance be assessed, that parents be accurately informed about student educational progress, and that courses of study be designed and effected to meet the needs of the pupil. As suggested previously, a school district's failure to perform any of these statutory obligations may permit a case for recovery of damages based on injuries proximately caused by the negligence. School districts must carefully meet the required guidelines of the minimum competency testing program in order to avoid the allegation of negligence.

Guidelines for Implementing Minimum Competency Testing

Minimum competency testing programs frequently create confusion as to who will bear ultimate responsibility for learning. Testing programs appear to put responsibility on the learner rather than the educational delivery system, but this conclusion is contrary to what we know about judicial standards applied to the nation's schools. Minimum competency testing must be harmonized with these judicial standards if it is to be implemented with a minimum of litigation.

The specific legal rationales that threaten to undermine minimum competency testing programs have been discussed in the previous pages. In this section I will suggest guidelines for the development and implementation of minimum competency testing programs using the legal rationales developed earlier in order to reduce the likelihood of legal actions challenging the program.

Two considerations are warranted at the outset. First, appropriate procedures for insuring a match between testing and instruction for achieving test validity and for minimizing bias are within the province of educators. While subject to the scrutiny of courts, educators are compelled to meet only the reasonable standards of practice for their profession, for it is often the education profession's standard upon which the court will ultimately rely. Consequently, educators enjoy a legal presumption of appropriate practice and that presumption can prevail if the educator seeks out, executes, and documents his or her

commitment to the best standards of practice in the profession with regard to implementation of minimum competency testing.

Second, identifying the elements of a minimum competency program that will be immune to litigation is simply not possible at this time. We lack sufficient information on the positions courts may take in future legal actions, and the diversity of programs in various states prohibits any final answers or guaranteed models. Some legal excesses in minimum competency testing programs have been identified by courts; many more have been effectively filtered out by pilot studies, limited experimental programs, and gradual phase-in efforts carefully supervised by knowledgeable and concerned educators.

These two considerations lead to the inescapable conclusion that educators must act with extreme caution in implementing minimum competency testing programs. Programs should be developed in stages; begin with pilot projects or limited experimental projects initially, and then expand as rational procedures are developed. Models of appropriate practice and searches of professional literature should be utilized in ongoing evaluation and modification of any testing program.

In addition to a commitment by the education professional to bring the best standards of educational practice to the design and implementation of minimum competency testing, the active involvement of citizens is critical. The earlier discussion of legal issues emphasized that minimum competency testing confronts a complex set of social and educational problems. Broadly based citizen participation in all phases of design and implementation is essential. Particularly in the areas of developing curricular goals, establishing the purposes of the testing program, and minimizing test bias, citizen input and involvement is helpful in insulating the school system against charges of arbitrariness or lack of good faith.

In the realm of legal liability, citizen and educator must give unrelenting consideration to the risk of injury to the student in the implementation of the testing program. As each element in the testing program is developed, the question of undue harm to the student's learning opportunity needs to be addressed. The reason for this concern is that no lawsuit can originate without an allegation of injury. Conse-

quently, by developing procedural safeguards that reduce the risk of unfair treatment or irreparable injury, a necessary element in a lawsuit is likely to be obviated.

Procedural safeguards will vary according to state law and administrative discretion. There is no single formula for procedural rules that is best for all situations. In developing and implementing policies and procedures for minimum competency testing, consideration should be given to a number of guidelines suggested by recent litigation as follows:

1. It is not necessary to abandon the existing curriculum in order to establish a competency testing program, but once competency testing is mandated, the specification of minimum competencies must be matched with the curricular goals and objectives of the school system. At the initiation of the program and throughout its administration, tests of competency must measure what is taught.

2. Curricular validity, represented by the degree of correspondence between test items and curricular objectives, is not conclusive of the reasonableness of a minimum competency test. Evidence that actual instruction is congruent with curricular objectives and test items must be obtained in order to establish a rational basis for the testing program. This evidence should be obtained from periodic review, evaluation, and documentation of classroom activities.

3. All test items must be carefully developed and evaluated to insure conformance with curricular objectives and to eliminate bias related to racial, ethnic, or national-origin minority status. North Carolina's protocol is exemplary in that test items were scrutinized by representatives of various racial, ethnic, and language groups. These groups were charged with the responsibility of "flagging" items considered irrelevant to the specified curriculum objectives or unreasonably biased. In addition, pilot testing of the test instrument was conducted for the purpose of identifying and eliminating test items where race and ethnic groups scores deviated significantly.

4. Other measures, in addition to the minimum competency test, should be used as a basis for placement or award of the diploma. A student's extracurricular activities, part-time employment, vocational

training, and other factors may appropriately be weighed by school authorities relative to determination of competency.

5. Special attempts should be made to overcome cultural biases inherent in the construction and administration of the competency test. In addition to the efforts to eliminate bias in test items mentioned above, test items that compel competency in English where English competency is not the objective of the test section might more logically be written in the student's primary language. Consideration should also be accorded to the diverse cultures represented in the community by the inclusion of test items reflecting cross-cultural competence related to the school's curriculum and the community's cultural pluralism.

6. The setting of cut-off levels for proficiency should be a process of well-documented deliberation that conforms to any statutory requirements of the state and avoids any suggestion of capriciousness. Results of pilot testing, coupled with expert opinion and community input on appropriate standards, are a few of the sources that should be considered in determining a cut-off level. Any cut-off level may be arbitrary to some degree. What is critical is that the final decision reflect a consensus about the standard of competency based on documented consultation and evidence of congruence among the opinions solicited.

7. The phase-in period for minimum competency testing must include early and periodically repeated notice to students and parents. Notice should clearly specify what students are expected to know and how this knowledge will be assessed. Furthermore, the consequences of testing for competency should be made known, particularly as they affect educational placement or award of the diploma.

8. The length of time required for adequate notice to students and parents depends in part upon the time required to make necessary curricular or instructional changes to implement a competency-based educational program. Where the consequences of a testing program could result in denial of the diploma or other substantial harm to the student, a program providing notice beginning with the first grade might be required, but at least one court has ruled that a minimum of six-years notice is compulsory before a diploma can be denied.

9. Notice would extend to the instructor's classroom comments as well as official written notification to student and parent. Both these forms should be incorporated and augmented by pretesting designed to inform students of test protocols. Information on the student's educational progress should be periodically reported to the parent. Reference to the requirements for minimum competency testing should be related to any deficiences in pupil progress reported periodically during students' years in school.

10. Initially, minimum competency testing should be used primarily for identification and diagnosis of learning deficiencies, rather than to deny the diploma or certificate of graduation. Once identified, students should be permitted sufficient remedial or compensatory experiences to help them pass the test. Effective and systematic procedures to identify, counsel, and remediate students are a vital element in a model minimum competency testing program.

11. Several options should be available to students who fail the minimum competency examination required for graduation. Among the options are the following:

a. Opportunity to take a competency examination again at another time or at any later date in their lives.

b. Allowance for a differential standard or assessment procedure.

c. Remedial or compensatory training in the specific areas where a lack of competency was demonstrated.

12. Options should also be available to students who were previously enrolled in racially segregated schools. A presumption of inferior education obtained in these schools would lead to the conclusion that these students could be unduly penalized by competency tests. Exemption from testing or deferred introduction of the testing program until the vestiges of past discrimination are no longer present are among the available options.

13. Remedial or compensatory programs should not be so pervasive as to force tracking in all courses. Provisions must be elaborated to insure that remediation does not become a system for segregating students on the basis of race or ethnic origin.

14. Handicapped students require individual determinations with

regard to the nature and extent of their participation in minimum competency programs. Early incorporation of a plan utilizing differential standards of assessment or alternative testing modes can be incorporated in the individual educational programs for these students.

The legislative mandate for some form of minimum competency testing may not include provision for all of the elements in the guidelines suggested. But once the responsibility to implement minimum competency testing is mandated, whether by state or local district, educators are in a position to influence the elements of the program as it is initiated and administered. Where minimum competency testing is guided by educators and citizens who recognize its legal implications, reasonable judgments about competency testing can serve the end of meaningful educational opportunity.

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